FILED
SEP 29
CHARLES ELMORE

No. 326

IN THE

Supreme Court of the United States

October Term, 1948

FRANK A. COLONELL,
Petitioner

v.

BENJAMIN S. GOODMAN, WILLIAM PLEET, SADIE G. PLEET, LIBBY GOODMAN, and PARKWAY OIL COMPANY, a corporation,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

THOMAS C. EGAN,
1224 Lincoln-Liberty Building,
Broad and Chestnut Streets,
Philadelphia 7, Pennsylvania,
Attorney for Petitioner.

JOHN J. GAIN,
1224 Lincoln-Liberty Building,
Broad and Chestnut Streets,
Philadelphia 7, Pennsylvania,
of Counsel.

The Legal Intelligencer, 19 S. 6th St., Phila. 6, Pa.

TABLE OF CONTENTS

Page

Petition:

Opinions Below 2

Summary Statement of Matter Involved 2

Jurisdiction 10

Questions Presented 10

Reasons Relied on for Allowance of the Writ 11

Cases Cited:

Carter v. Powell, 5 Cir., 104 F. 2d 428, 430, 431, certiorari denied, 308 U. S. 611, 60 S. Ct. 173, 84 L. Ed. 511 14

City Ice Co. v. Easton Merchants Ice Co., 267 Pa. 500, 110 At. 350 16

Lazier Gas Engine Co. v. DuBois, 130 Fed. 834 19

Oscanyan, Christopher, v. Winchester Repeating Arms Company, 103 U. S. 261, 26 L. Ed. 539 (1881) .. 12, 13

Steele v. Drummond, 275 U. S. 199, 72 L. Ed. 238, 48 S. C. 53 16

Trounstine et al. v. Bauer, Pogue & Co., Inc., et al., 144 F. 2d, 379 (1944), certiorari denied, 323 U. S. 777, 65 S. Ct. 19, 89 L. Ed. 621 14

Miscellaneous Citations:

Judicial Code, Section 240(a), as amended by the Act of February 13, 1925, c. 229, §1, 43 Stat. 938, 28 U.S.C.A. Sect. 347(a) 10

Restatement of Contracts, Section 600 13

Restatement of the Law of Agency, Comment e, Section 393 17

Rules of Civil Procedure:

Rule 8(c) 10, 12

Rule 12(h) 10, 12, 13, 14

Rule 15(a) 14

Page

Rule 15(b) 14
Rule 50(b) 3, 10, 15, 19

Rules of the United States Supreme Court:
Rule 38 1
Rule 38(5) 15

Williston on Contracts, Revised Edition, Volume 5, p. 4567. 13

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1948

No. —

FRANK A. COLONELL,

Petitioner

v.

BENJAMIN S. GOODMAN, WILLIAM PLEET, SADIE G. PLEET, LIBBY GOODMAN, and PARKWAY OIL COMPANY, a corporation,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Frank A. Colonell, respectfully prays for the issuance of a writ of certiorari to the Circuit Court of Appeals for the Third Circuit to review the final judgment of that Court, entered on July 2, 1948, which affirmed the judgment entered February 26, 1948 by the United States District Court for the Eastern District of Pennsylvania.

A certified transcript of the record in the case, including the proceedings in said Circuit Court of Appeals, together with the requisite additional copies thereof, is furnished herewith in conformity with Rule 38 of this Court.

OPINIONS BELOW

The opinion of the District Court, entered February 26, 1948, has not been officially reported. It appears at Page 381 of the Record. No formal opinion of the Circuit Court of Appeals has been filed. Its opinion affirming the judgment of the District Court upon the opinion of Judge Kirkpatrick was filed on July 2, 1948, and has not yet been officially reported. It appears on Page 393 of the Record.

SUMMARY STATEMENT OF MATTER INVOLVED

This is a civil action brought by Frank A. Colonell, the petitioner, against Benjamin S. Goodman, William Pleet, David H. Pleet, Sadie G. Pleet and Libby Goodman, individually and trading as P & G Realty Co., and Parkway Oil Company, a corporation, to recover on an oral contract for a five (5%) per cent commission on the sale of the stock of Parkway Oil Company to the Texas Company.

The action was instituted in the United States District Court for the Eastern District of Pennsylvania by reason of diversity of citizenship, the petitioner being a resident of Maryland and all of the defendants being residents of the Eastern District of Pennsylvania.

At the time of the making of the contract in suit, respondents Benjamin S. Goodman and William Pleet were the officers and directors of the respondent corporation, and Libby Goodman and Sadie G. Pleet, their wives, held title to all of the outstanding voting stock. The defendant David H. Pleet was the owner of the remaining though non-voting stock, which he sold to the women prior to the consummation of the sale to the Texas Company.

The case was tried before the Honorable William H. Kirkpatrick and a jury on November 10, 11, 12, 13 and 14, 1947, and resulted in a verdict and judgment in favor of

the petitioner, Frank A. Colonell, and against all of the respondents, in the sum of $51,990.93. The verdict was in favor of the defendant David H. Pleet (R. 375 and 376).

All of the Respondents moved for judgment under Rule 50(b) or in the alternative for a new Trial (R. 376). Petitioner moved for judgment under Rule 50(b) in the sum of $83,265.74 (R. 379). In an opinion dated February 26, 1948, the Learned Trial Judge granted respondents' motion for judgment on the ground that the contract sued upon was illegal and granted their alternative motion for a new Trial upon the ground that the jury had disobeyed one of his instructions (R. 381 to 390). On the same date, the judgment in favor of the petitioner was set aside and judgment was entered in favor of respondents (R. 390). On March 1, 1948, petitioner's motion for judgment under Rule 50(b) was denied (R. 391).

The appeal from said judgments was taken by petitioner to the Circuit Court of Appeals for the Third Circuit on March 1, 1948 (R. 392). On July 2, 1948, said Court, in a per curiam opinion, affirmed the judgment of the District Court upon the opinion of Judge Kirkpatrick (R. 393).

Petitioner proved that in the latter part of February, 1940 he was requested by respondent, Benjamin S. Goodman, the president of respondent Parkway Oil Company, to open negotiations with the Texas Company, a major producer and distributor of petroleum products, with the object of obtaining for the defendant Parkway Oil Company an exclusive distributorship for Texas Company products. The background of this initial discussion was that petitioner had been invited to become a part owner of Parkway Oil Company. This would have involved severing petitioner's connection as sales manager for the American Oil Company, which was then supplying Parkway with some of its petroleum products on what was known in the trade as a dual distributorship basis. Petitioner had informed Mr. Goodman that he would not be interested in becoming a part owner or active in the man-

agement of Parkway as long as it continued to function as a dual distributor for American Oil Company or any other supplier since any such arrangement would involve competition in the same territory with its supplier (R. 25 to 27).

In the course of the discussion referred to, petitioner pointed out to Mr. Goodman that the Texas Company, with some of whose officials he was previously acquainted, might not, as a matter of policy, be interested in granting an exclusive distributorship in the Philadelphia area but that they might be interested in acquiring ownership or control of a company like Parkway which operated a substantial number of owned or leased gasoline stations in Philadelphia. To this suggestion Mr. Goodman replied that he was always open for a proposition (R. 29, 30).

As a result, petitioner went to New York and discussed the proposition with some officials of the Texas Company who informed him that the Texas Company was not interested in granting an exclusive distributorship to Parkway. The trend of the conversation made it plain to petitioner that the Texas Company was definitely interested in acquiring ownership of Parkway, as petitioner had predicted (R. 29 to 33).

Upon his return to Philadelphia, petitioner reported the results of his conversation to Mr. Goodman and inquired what his standing would be in the event that negotiations culminated in a sale to the Texas Company. Mr. Goodman replied that in such an event petitioner would of course be entitled to "the usual five (5%) per cent commission." (R. 34).

It was then agreed that future negotiations with the Texas Company would be conducted by Mr. Goodman personally. After a short interval, Mr. Goodman advised the petitioner some time in March of 1940, that he had been contacted by officials of the Texas Company and he thereupon embarked upon extended negotiations leading to the sale of Parkway's business to that company. The negotiations continued until sometime in December of 1941

and Mr. Goodman consulted with and sought the advice of petitioner at every step of the way. Among other things he sought and obtained petitioner's assistance and advice in the preparation of a brochure outlining the assets and financial structure of the Parkway Oil Company, describing its retail sale outlets, its bulk oil plant and storage facilities and in general painting an attractive picture from a buyer's viewpoint (R. 35, 41 to 43).

The negotiations were interrupted in December, 1941 due to war conditions (R. 43, 44) and were not resumed until the later part of 1944, when the Texas Company again evidenced an interest in acquiring Parkway, although Mr. Goodman remained in touch with the Texas officials in the interval and so advised the petitioner. On this occasion, Mr. Goodman renewed his promise to pay petitioner a commission of five (5%) per cent in the event that a sale should take place (R. 45, 46).

Thereafter Mr. Goodman continued to consult with the petitioner and obtained his advice concerning many details of the negotiations. The sale was eventually consummated in June, 1945, and took the form of a transfer of all of the stock of the Parkway Oil Company, which at that time was owned equally by respondents Sadie G. Pleet and Libby Goodman, for a cash consideration of $914,146.24 (R. 49, 138 and 139).

As part of the same transaction the largest single asset of the Parkway Oil Company, a valuable bulk oil plant and water terminal was caused to be conveyed by the corporation to the respondents Sadie G. Pleet and Libby Goodman, as partners doing business as the P & G Realty Co. for an inflated, stated consideration and was simultaneously leased by these defendants to the Texas Company for the term of twelve (12) years at an annual rental of $30,000.00 with the option upon the part of the Texas Company to purchase the same at the end of the term for an additional consideration of $197,500.00 (R. 139, 140).

Petitioner in his complaint sought to recover from all of the individual respondents and the corporation a sum

equivalent to five (5%) per cent of the sale price of the stock plus five (5%) per cent of the value of the bulk oil plant which had been so adroitly eliminated from the corporate assets.

In his original charge to the jury, his Honor Judge Kirkpatrick directed that petitioner's recovery would have to be limited to five (5%) per cent of the consideration received for the sale of the respondents' stock as such, with interest at the legal rate, and could not include the value of the bulk plant. This instruction was repeated in response to a specific request for further instruction by the jury, which indicated that a verdict for the full amount would have been rendered if the jury had been permitted to do so (R. 355, 359, and 366).

Judge Kirkpatrick also directed the jury that they must find in favor of the respondent officers of the corporation, namely, the respondents, Benjamin S. Goodman and William Pleet, and at a later stage, after the jury had returned with a finding against the corporate respondent but no specific finding as to the individual respondents that they must find in favor of all of the individual respondents if their verdict should be against the corporation (R. 356, 359, 367 to 369).

Notwithstanding this instruction, the jury's verdict was against the corporation and all of the individual defendants except David H. Pleet who had sold his stock to Mrs. Goodman and to Mrs. Pleet, his sister-in-law, by the time the sale to the Texas Company was consummated.

The action of the District Court, setting aside the verdict of the jury and the judgment entered thereon and entering judgment for the defendants, is predicated solely upon the theory that the contract sued upon was illegal because it tended to induce a violation of the petitioner's duty to his employer. As the Trial Judge put it,

> "The plaintiff, as a managing official or executive of a corporation, owed it a fiduciary as well as a contractual duty. 'An agent is a fiduciary with respect

to matters within the scope of his agency.' Restatement, Agency 13.

'. . . any bargain that tends to induce a violation of a fiduciary's duty as such, is illegal except when effectively consented to by the beneficiary or principal . . .' Restatement, Contracts, Sec. 570. Broad considerations of public policy condemn such contracts" (R. 385).

Neither the Complaint (R. 4), nor respondents' original answer (R. 9), contained any reference to petitioner's relationship with American Oil Company, his employer. Nor was the defense of illegality pleaded in any manner whatsoever until the third day of the Trial after petitioner had concluded his case. At this juncture, respondents moved to dismiss the Complaint on the ground that "the plaintiff's evidence does not justify or support a cause of action, primarily on the ground that the contract which plaintiff alleges he made for the commission was in derogation of and in violation of his employment contract with the American Oil Company." (R. 217). In connection with that motion, respondents presented a written amendment to their Answer which was allowed to be filed over petitioner's objection and exception. At the same time, petitioner moved to strike the amended Answer, which motion was denied (R. 217).

The amended answer was identical with the original answer, except for the addition of the following paragraph:

"16. At all times mentioned or referred to in the complaint, the plaintiff was Sales Manager of the Amercian Oil Company, and as such was, among other things, directly or indirectly in charge of and responsible for sales of the products of American Oil Company in an area which included the Parkway Oil Company, and the Parkway Oil Company was, under various written contracts between it and the American Oil Company, a distributor of products sold to it by the

American Oil Company; wherefore, the complaint fails to state a claim against the above-named defendants upon which relief can be granted." (R. 15).

Respondents' defense to the action, as set forth in their original answer (R. 9) and their testimony at the Trial, was predicated solely upon a flat denial of the making of the contract and it was upon this theory that the case was tried. As part of their own case, respondents offered no evidence bearing directly or indirectly upon the question suggested for the first time by the amended Answer.

As far as the American Oil Company's interest in the transaction was concerned, the following facts were established by the evidence and were uncontradicted:

1. While the petitioner was one of the sales managers employed by the American Oil Company, he had no written or verbal contract for any period of time and his relationship was terminable by either party at will (R. 60).

2. That the Parkway Oil Company had no written contract at all with the American Oil Company when the sale of Parkway to Texas Company took place, the last written contract having expired July 1, 1943, and it contained no automatic renewal clause (R. 294).

3. That the American Oil Company was not interested in or anxious to keep the Parkway Oil Company as a customer, neither was it interested in buying Parkway's business, petitioner having offered the proposition to the American Oil Company, which declined it (R. 75 and 76).

4. Parkway had a consistent history of difficulty with its suppliers. At the time the original contract with American was negotiated, Parkway's contract with its former supplier had been cancelled and it was in danger of having no supplier at all (R. 290 to 293). On one occasion, during the progress of the negotiations with the Texas Company, the American Oil Company threatened to cancel its contract with Parkway and petitioner "saved the day" (R. 76).

In spite of the jury's verdict, the Trial Judge disregarded petitioner's testimony on the question of American's interest in Parkway for the reason that *petitioner* called no witnesses to substantiate it (R. 386).

Respondents' alternative motion for a new trial was granted upon the ground that the Jury had disregarded the Trial Judge's instructions in returning a verdict against the individual respondents, as well as the corporation respondent. Because of the relationship of the respondents to each other and to the corporation, the absolute and unrestricted authority which Mr. Goodman, and to a lesser degree, Mr. Pleet had and exercised by virtue of their position as officers and directors of the corporation and as husbands of the nominal stockholders, who were never consulted about any phase of the business (R. 215, 216), petitioner took the position in the Complaint (R. 8) and in his Request for Instructions (R. 365) that the respondents were jointly and severally liable.

The Trial Judge instructed the jury that if they found for petitioner they could find against either the corporation or the stockholders but not both, and that in no event could they find against Mr. Pleet and Mr. Goodman, whom he conceived to be acting only as agents. A new Trial was granted in the alternative, in the event of a reversal, on the theory that the charge of the Court, whether erroneous or not, constituted the law of the case and the jury's disregard of such charge was automatically ground for a new trial. As to this question, petitioner contended in the Circuit Court of Appeals and contends here (1) that the Court's charge was erroneous, (2) that the jury's verdict is correct and in accordance with the law and (3) that the jury's disregard of an erroneous instruction does not furnish ground for a new Trial. The Circuit Court of Appeals did not specifically pass upon this question since it filed no opinion.

The remaining matter involved in the Courts below was petitioner's motion for judgment in the sum of $83,-

265.74 under Rule 50(b) of the Rules of Civil Procedure. The question arose as the result of the Trial Judge's refusal to affirm petitioner's Sixth Point for Charge, which sought to have the jury's verdict include a commission of five (5%) per cent upon the value of the bulk oil plant which was an asset of Parkway Oil Company immediately prior to the sale of its stock to the Texas Company and which, as part of the same transaction, was conveyed out of the corporation to Mrs. Pleet and Mrs. Goodman and in turn leased by them to the Texas Company for a term of twelve (12) years with an option to buy. The value of the plant was shown by the testimony to be $557,500.00 (R. 140).

Petitioner contends that the Trial Judge was clearly in error in excluding the value of the bulk plant from the calculation of petitioner's commission and that his motion under Rule 50(b) for judgment in the increased sum should have been allowed.

JURISDICTION

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, c.229, § 1, 43 Stat. 938, 28 U.S.C.A. Sect. 347(a). The judgment of the Circuit Court of Appeals sought to be reviewed was entered on July 2, 1948.

QUESTIONS PRESENTED

The questions here presented are,

(1) Whether the defense of illegality is waived by failing to plead it in the responsive answer as required by Rules 8(c) and 12(h) of the Federal Rules of Civil Procedure.

(Answered negatively by the Court below.)

(2) Whether such waiver can be cured by an amended answer filed over plaintiff's objection on the third day of

trial after plaintiff had rested, which answer purported to set up the defense that the *complaint* failed to state a claim upon which relief could be granted.

(Answered affirmatively by the Court below.)

(3) Whether the Trial Judge had the power to set aside the jury's verdict for the petitioner and enter judgment for the respondents upon the sole ground that the contract sued upon was illegal and contrary to public policy, where illegality was not in issue and the jury had no opportunity to pass upon any facts bearing upon this question.

(Answered affirmatively by the Court below.)

(4) Whether a new trial may be granted solely on the ground that the jury disregarded an erroneous instruction of the Trial Judge.

(Answered affirmatively by the Court below.)

(5) Where, as part of an agreement for the sale of the entire capital stock of a corporation, upon which plaintiff was promised a commission of 5%, one of its assets was transferred for a nominal consideration to the stockholders as individuals and simultaneously leased by them to the purchaser with an option to buy, should plaintiff's commission include 5% of the proven value of the lease?

(Answered negatively by the Court below.)

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

1. The Circuit Court of Appeals has decided an important question of federal law which has not been but should be settled by this Court.

The decision of the Circuit Court of Appeals which adopts the opinion of the Trial Judge is predicated upon the theory that the defense of illegality need not be pleaded

at all. It is petitioner's contention that under the Rules of Civil Procedure, illegality is an affirmative defense which must be pleaded in the answer and which is waived if not pleaded.

Rule 8(c) of the Rules of Civil Procedure provides in part as follows:

> "Affirmative Defenses. In pleading to a preceding pleading, a part shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense."

Rule 12(h) provides in part:

> "Waiver of Defenses. A party waives all defenses and objections which he does not present either by motion as hereinbefore provided or, if he has made no motion, in his answer or reply, except (1) that the defense of failure to state a claim upon which relief can be granted, and the objection of failure to state a legal defense to a claim may also be made by a later pleading, if one is permitted, or by motion for judgment on the pleadings or at the trial on the merits, . . ."

If the rules above quoted mean what they say, respondents waived the defense of illegality by failing to plead it.

We are not unmindful of the decision of this Court in the case of Christopher Oscanyan v. Winchester Repeating Arms Company, 103 U. S. 261, 26 L. Ed. 539 (1881), holding that illegality can be considered, although not affirmatively pleaded. We do however urge the allowance of the Writ and an examination of the question in the light of the

Rules of Civil Procedure, which have been promulgated by this Court.

It should here be observed that the Court in the *Oscanyan* case was dealing with a blatant and serious type of illegality involving the bribery and corrupt influencing of a public official. As far as the obscure and tenuous type of illegality which is contended for by the respondents is concerned, the Rules of Civil Procedure contain no innovation. As is stated in Williston on Contracts, Revised Edition, Volume 5, Page 4567, "Yet, if the illegality was not serious or if public policy does not clearly require denial of relief, the Court may refuse thus to take notice of illegality which is not pleaded, but appears from the evidence given or offered," citing the Restatement of Contracts, Section 600, and many appellate decisions.

2. The Circuit Court of Appeals has rendered a decision in conflict with the decisions of the Circuit Courts of Appeals for the Second and Fifth Circuits.

The reason here urged for the allowance of the Writ is predicated upon the assumption that the Court below attached some significance to respondents' amended answer which was allowed over petitioner's objection after petitioner had rested his case (R. 217). If it did, the question here involved is also an important federal question which has not been but should be settled by this Court.

If the defense of illegality was waived by failing to plead it in the original answer, the waiver could not have been cured by the curious additional paragraph in the amended answer (R. 15). That paragraph, which would have been termed a speaking demurrer at common law, was simply a poorly disguised attempt to avoid the waiver provisions of Rule 12(h) by a belated and unjustified attack on the complaint. The complaint did not contain a word upon which the defense of illegality could have been predicated.

Even assuming that the amendment properly pleaded the defense of illegality, there can be no justification for waiting until the middle of the trial to offer it. The alleged

facts contained in the amendment were not facts which the respondents just discovered or which came to their knowledge as part of petitioner's case. Aside from their actual knowledge of the true facts at the time of their occurrence, respondents took petitioner's deposition, to the extent of 117 pages, five months before the trial (R. 89). The facts were fully explored then and could not conceivably have come to the respondents as a surprise. The plain truth of the matter is the respondents expected to escape liability by denying the existence of the contract, both in their original Answer and at the trial. That the contract was illegal never occurred to the respondents or to anyone else in the case, including the Trial Judge. The idea was advanced for the first time after petitioner had rested.

That affirmative defenses are waived if not pleaded, as provided by Rule 12(h), *before trial* is clear from the decision of the Circuit Court of Appeals for the Second Circuit in Trounstine et al. v. Bauer, Pogue & Co., Inc., et al., 144 F. 2d, 379 (1944), Certiorari denied, 323 U. S. 777, 65 S. Ct. 19, 89 L. Ed. 621; see also Carter v. Powell, 5 Cir., 104 F. 2d 428, 430, 431, Certiorari denied, 308 U. S. 611, 60 S. Ct. 173, 84 L. Ed. 511.

There was no justification for allowing this amendment under Rule 15(a), for there was no possible explanation for the delay in offering it, nor can it be justified under Rule 15(b) as an amendment to conform to the evidence, since this issue was not tried at all.

Respondents offered no evidence whatever in support of the illegality proposition nor did petitioner for the obvious reason that the question was never in issue.

3. The Circuit Court of Appeals has sanctioned such a departure from the accepted and usual course of judicial proceedings by the District Court as to call for an exercise of this Court's power of supervision to correct a grave injustice.

This reason for the allowance of the Writ is not assigned through desperation nor in any effort to exhaust

the reasons for its issuance suggested by Rule 38 (5), of this Court. On the contrary, it is urged and emphasized in the sincere conviction that petitioner has been deprived of important fundamental rights by the action of the District Court in granting judgment notwithstanding the verdict of the jury. It is contended that that Court abused the power conferred by Rule 50(b) of the Rules of Civil Procedure.

The case was pleaded and tried on but one theory involving two issues of fact, namely, whether petitioner and respondents had entered into the contract in suit and whether petitioner's efforts had been the efficient cause of the sale. After these issues had been resolved in petitioner's favor by the jury's verdict, the Trial Court set it aside and entered judgment for respondents upon a wholly new theory which necessarily involved a determination of a different question of fact.

The theory upon which the Trial Court set aside the verdict and judgment is summed up in the following extract from the opinion of Judge Kirkpatrick (R. 385):

> "The plaintiff, as a managing official or executive of a corporation, owed it a fiduciary as well as a contractual duty. 'An agent is a fiduciary with respect to matters within the scope of his agency,' Restatement, Agency, Sec. 13."
>
> "'. . . any bargain that tends to induce a violation of a fiduciary's duty as such, is illegal except when effectively consented to by the beneficiary or principal . . .,' Restatement, Contracts, Sec. 570. Broad considerations of public policy condemn such contracts."

The Trial Court disposed of the case on the foregoing legal principles without giving the jury a chance to pass upon the ultimate questions whether petitioner's conduct *in fact* tended to induce a violation of his duty or whether his employer was in fact harmed, helped or unaffected by the transaction. In so doing, the Trial Court deprived peti-

tioner of his constitutionally guaranteed right to a trial by jury just as effectively as if the jury had been excluded from the court room.

It is axiomatic that the party asserting the illegality of a contract has the burden of proving how and why it is unlawful; City Ice Co. v. Easton Merchants Ice Co., 267 Pa. 500, 110 At. 350. Respondents did not even attempt to meet this burden since they failed to call any witnesses or produce any evidence whatever on this point. They chose to rest upon the facts which appeared incidentally during petitioner's case, that he was a sales manager for the American Oil Company and that the Parkway Oil Company was a customer of American. In disregarding petitioner's uncontradicted testimony on cross-examination which demonstrated the complete absence of any conflict of duties on his part, the Trial Judge seems to have assumed that the burden of disproving illegality was upon the petitioner and that it was his duty to call witnesses to substantiate his testimony (R. 386). That is simply not the law in any jurisdiction, regardless of which party has the burden of proof.

Without arguing the substantive question, which has no place here, as to whether there was any illegality, immorality or even poor taste in petitioner's entering into the contract in suit, it can hardly be contended that any clear case of illegality or contravention of public policy has been made out. While this Court has repeatedly refused its aid in the enforcement of contracts entered into a violation of settled rules of public policy, it has been equally zealous in upholding the freedom of contract where no clear conflict of dominant public interest appears. In Steele v. Drummond, 275 U. S. 199, 72 L. ed. 238, 48 S. C. 53, the late Mr. Justice Butler said at page 205, "It is only because of the dominant public interest that one, who has had the benefit of performance by the other party, is permitted to avoid his own obligation on the plea that the agreement is illegal. And it is a matter of great public concern that free-

dom of contract be not lightly interfered with. . . . The meaning of the phrase 'public policy' is vague and variable; there are no fixed rules by which to determine what it is. It has never been defined by the Courts, but has been left loose and free of definition, in the same manner as fraud. . . . It is only in clear cases that contracts will be held void. The principle must be cautiously applied to guard against confusion and injustice."

Once again, without fully arguing the point, it must be observed that the illegality which is asserted here is by no means clear or even plausible. What the petitioner actually did here was to bring about and facilitate a sale of stock. The purchaser of that stock acquired thereby the ownership and control of a corporation, subject to all of the contractual rights of liabilities, if any, which the corporation enjoyed or owed to the American Oil Company or to anyone else. The American Oil Company was certainly in no worse position with respect to contractual rights after the sale than it was before.

Petitioner's original mission was to obtain an exclusive distributorship of Texas Company's products in connection with his promised part-ownership and operation of the respondent corporation. The eventual but predicated outcome, namely, a sale to Texas Company, was a natural and foreseeable result of the negotiations. His legal capacity and privilege to embark upon his venture is confirmed, if it needs any confirmation, in Comment e, Section 393 of the Restatement of the Law of Agency, dealing with the duty of an agent not to compete with his principal concerning the subject matter of his agency. This comment states:

> "e. After termination of agency. After the termination of his agency, the agent may compete with his principal as to matters for which he had been employed and may, before the termination of the agency, make arrangements to do so, except that, to the extent stated

in 396, he may not use confidential information peculiar to his employer's business and acquired therein. Thus, before the close of his employment, he may purchase a rival business and upon the termination of the agency immediately compete with his former employer. He may not, however, before the termination of his employment, solicit customers for such rival business, nor may he do other similar acts in direct competition with the employer's business."

As has been said before, petitioner's employment with American Oil Company could have been terminated by him or by it at any time. All he had to do was leave when he felt like it. While his duties as sales manager involved general supervision over marketing in an area which included that occupied by the Parkway Oil Company, he did not have actual supervision over the Parkway account after July 1941, when he turned the account over to someone else in the organization (R. 59).

With all due deference to the Opinion of the Learned Trial Judge, it seems clear that what really shocked the Chancellor's conscience was the amount of the recovery sought and not the enormity of petitioner's conduct in earning it. During the Trial, respondents' Counsel stressed, and the Court, but not the jury, was impressed by the argument that all petitioner did to earn such a large sum of money was to make one trip to New York. Apart from the fact that that statement was not true since petitioner rendered all kinds of assistance during the progress of negotiations, it has no legal bearing whatsoever. Petitioner's agreed commission was five (5%) per cent of the sales price. If that represents a large amount of dollars it is only because the sales price was twenty times as much.

Even more startling is the suggestion made by the Trial Judge during the course of the trial and referred to in the Court's Opinion, that, in view of the large amount of the

commission claimed and the comparatively small amount of work done by the petitioner, petitioner's action should properly be based on an implied promise of compensation in return for his failure to receive an interest in Parkway (R. 384). It is difficult to see how the wrongdoing which the Trial Court says was inherent in this transaction could be cured or tempered by the mere expedient of changing the legal theory upon which recovery was sought, while the facts remain the same. The development of the law on this subject will be arrested by a curious twist indeed, if a contracting party's wrongdoing can be measured by the amount he is willing to settle for when the other party welshes.

It is contended that petitioner has been deprived of the rights of trial by jury and of freedom of contract by the Trial Court's arbitrary and unorthodox setting aside of the jury's verdict. It is urged that either consideration is of sufficient importance to warrant the exercise of this Court's power of supervision.

The matters involved in petitioner's fourth and fifth questions presented should properly await an argument on the merits if this Court sees fit to grant the Writ prayed for. Suffice it to say that the District Court's action in granting respondents' alternative motion for a new trial appears to be in direct conflict with the decision of the Circuit Court of Appeals for the Third Circuit in Lazier Gas Engine Co. v. Du Bois, 130 Fed. 834. As there was no reversal, this question was not passed upon by the Circuit Court of Appeals except by implication in the event of a reversal by this Court.

The fifth question presented involves a construction of Rule 50(b) of the Rules of Civil Procedure and a determination of the question whether the motion for judgment therein provided is available to a plaintiff where it is sought to increase the amount of judgment to include damages wrongfully excluded by the Trial Judge in his charge to the jury.

Conclusion

For the foregoing reasons, it is respectfully submitted that this petition for a Writ of Certiorari should be granted, and that this Court should review the decision of the Circuit Court of Appeals and finally reverse it.

THOMAS C. EGAN,
Attorney for Petitioner.

JOHN J. GAIN,
Of Counsel.

FILE COPY

Office - Supreme Court, U. S.
FILED
NOV 5 1948
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

No. 326.

October Term, 1948.

FRANK A. COLONELL,
Petitioner,

v.

BENJAMIN S. GOODMAN, WILLIAM PLEET, SADIE G. PLEET and LIBBY GOODMAN, Individually and Trading as P & G REALTY CO., and PARKWAY OIL COMPANY, a Corporation.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR BENJAMIN S. GOODMAN, WILLIAM PLEET, SADIE G. PLEET AND LIBBY GOODMAN, INDIVIDUALLY AND TRADING AS P & G REALTY CO., AND PARKWAY OIL COMPANY, IN OPPOSITION.

BERNARD G. SEGAL,
IRVING R. SEGAL,
Attorneys for Respondents.

SCHNADER, HARRISON, SEGAL & LEWIS,
1719 Packard Building,
Philadelphia 2, Pennsylvania,
Of Counsel.

International, 236 Chestnut St., Phila. 6, Pa.

INDEX TO BRIEF.

	Page
Opinions Below	1
Jurisdiction	1
Statement	2
Argument	3
1. Illegality of the Contract and Necessity for Pleading It	3
2. Petitioner's Effort to Escape Effect of Illegality of Contract	7
3. Petitioner's Motion for Judgment for $83,265.74	12
4. Alternative Award of New Trial	13
5. Uncertainty of Petitioner's Contract	14
Conclusion	15

TABLE OF CASES CITED.

	Page
Albright v. Kalbitzer, 62 F. Supp. 815 (E. D. Pa. 1945)	14
Atlee et al. v. Fink, 75 Mo. 100 (1881)	4
Bailey v. Anderson, 326 U. S. 203 (1945)	11
R. F. Baker & Co., Inc. v. P. Ballantine & Sons, 127 Conn. 680, 20 A. (2d) 82 (1941)	14
Chicago, Indianapolis and Louisville Railway Company v. McGuire, 196 U. S. 128 (1905)	11
Dain v. Loeffler et al., 256 Pa. 319, 100 Atl. 888 (1917).	14
Dorrance et al. v. Pennsylvania, 287 U. S. 660 (1932).	11
Everhart v. Searle, 71 Pa. 256 (1872)	4
Fitzsimons v. Eagle Brewing Co., 107 F. (2d) 712 (C. C. A. 3rd, 1939)	5
Frye v. Lyon, 299 Fed. 926 (App. D. C. 1924)	14
Johnson, to use of McCarter v. Nippert (No. 1), 294 Pa. 464 (1928)	4
Koznhowski et al. v. Litvinas, 87 Pa. Superior Ct. 406 (1926)	14, 15
Lazier Gas Engine Co. v. DuBois, 130 Fed. 834 (C. C. A. 3rd, 1904)	13, 14
Mullett v. Milkey, 113 Vt. 42, 29 A. (2d) 806 (1943)	14
Myers v. Hodges, 2 Watts (Pa.) 381 (1834)	4
New Haven Road Const. Co. v. Long, et al., 269 Mass. 16, 168 N. E. 161 (1929)	4
Oscanyan v. Arms Company, 103 U. S. 261, 266 (1880)	4, 5, 11
Pollock v. MacElree, 56 F. Supp. 961 (E. D. Pa. 1944)	4
Reiner v. North American Newspaper Alliance, 239 N. Y. 250, 181 N. E. 561 (1932)	4
Rhoades v. Malta Vita Pure Food Co., 149 Mich. 235, 112 N. W. 940 (1907)	4
Steele v. Drummond, 275 U. S. 199 (1927)	11

TABLE OF CASES CITED (Continued).

	Page
The Michigan Steel Box Co. v. The United States, 49 Ct. Cl. 421 (1914)	4
The Pennsylvania Railroad Co. v. Flanigan, 112 Pa. 558 (1886)	4
Tillman v. National City Bank of New York, 118 F. (2d) 631, 635 (C. C. A. 2nd, 1941)	5, 6
Turner v. Baker, 225 Pa. 359, 74 Atl. 172 (1909)	14
Van Pelt et al. v. Casaccio et al., 86 Pa. Superior Ct. 590 (1926)	15
Western Union Telegraph Co. v. Winland, 182 Fed. 493 (C. C. A. 8th, 1910)	11
Wilson et al. v. Franklin, 282 Pa. 189, 127 Atl. 609 (1925)	14
Wolfe et al. v. International Re-Insurance Corporation, 73 F. (2d) 267 (C. C. A. 2d, 1934)	4

STATUTES AND AUTHORITIES CITED.

	Page
Judicial Code, Section 240 (a), as amended by the Act of February 13, 1925	1
Judicial Code, Section 1254 (1), approved June 25, 1948, which became effective September 1, 1948	1
1 Moore's Federal Practice, p. 568	5
Restatement of Agency:	
Section 393 (e)	9
Section 449	14
Restatement of Contracts, Section 570	4
Rules of Civil Procedure:	
Rule 8 (c)	6
Rule 12 (h)	6
Rule 15 (a)	6
Rule 15 (b)	5
Rule 50 (b)	10

IN THE

Supreme Court of the United States

No. 326. October Term, 1948.

FRANK A. COLONELL,
Petitioner,
v.
BENJAMIN S. GOODMAN, WILLIAM PLEET, SADIE G. PLEET AND LIBBY GOODMAN, INDIVIDUALLY AND TRADING AS P & G REALTY CO., AND PARKWAY OIL COMPANY, A CORPORATION.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR BENJAMIN S. GOODMAN, WILLIAM PLEET, SADIE G. PLEET AND LIBBY GOODMAN, INDIVIDUALLY AND TRADING AS P & G REALTY CO., AND PARKWAY OIL COMPANY, IN OPPOSITION.

OPINIONS BELOW.

The opinion of the Court of Appeals to which the writ of certiorari is here sought, is reported at 169 F. (2d) 275. In it, the Court, *per curiam*, affirmed the judgment of the District Court "upon the careful opinion of Judge Kirkpatrick." The opinion of the District Court is reported at 78 F. Supp. 845.

JURISDICTION.

The judgment of the Court of Appeals (R. 393a-394a) was entered July 2, 1948. The petition for a writ of certiorari was filed September 29, 1948. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (superseded by Section 1254 (1) of the Judicial Code, approved June 25, 1948, which became effective September 1, 1948).

STATEMENT.

The facts, viewed in the light most favorable to petitioner, as to the making of his oral contract for a commission on the sale of Parkway Oil Company's stock, and as to the steps leading up to and culminating in the sale, are adequately set forth in the opinion of the District Court (R. 381a-383a, 78 F. Supp. at 845-6). While there are inaccuracies in petitioner's statement, we do not believe it necessary to go into them in detail for purposes of this brief.

Instead, we shall refer to the more important discrepancies in petitioner's statement in connection with our argument on the questions presented by petitioner.

ARGUMENT.

1. Illegality of the Contract and Necessity for Pleading It.

(Petitioner's Questions 1, 2 and 3.)

Petitioner in his brief, directly or by innuendo, has attempted to invoke virtually every ground upon which this Court has declared the issuance of a writ of certiorari to a Court of Appeals to be justified. If the petition and the accompanying brief are read alone, this would appear to be a complicated case determined in the Courts below by a close decision.

Actually, the opinion of the Trial Judge on the entry of judgment for defendants is neither obscure nor tortuous. It consists of a concise statement of basic principles barring recovery by the petitioner. And the Court of Appeals, far from evidencing any difficulty with the case, unanimously affirmed the District Court without finding it necessary to go beyond Judge Kirkpatrick's opinion, except to comment upon its "careful" nature.

Why, then, this apparent ease of both Courts below in reaching a decision, as opposed to the petitioner's involved presentation of the issues? Because the District Court and the Circuit Court plainly saw the fundamental issue in this case, and having resolved it against petitioner, found little else to discuss, while petitioner, unable to refute the principle underlying the decision below, has sought to obscure it by creating a multiplicity of issues.

Simply stated, the question is one of morals. None of the judges below had any doubt that the sales manager of an oil company could not, consistent with fundamental concepts of decency and morality, be permitted to recover compensation for services, the result of which was to lose for his employer its largest customer in the Philadelphia area,—one whose patronage it had enjoyed for more than six and a half years (R. 24a, 87a). The contract upon which peti-

tioner sought to recover was based upon a violation of his fiduciary duty to his employer, and as such was condemned by "broad considerations of public policy". The rule of public morality applied by the Courts below is succinctly set forth in Section 570 of the Restatement of Contracts.

For a much less serious violation of fiduciary duty, Circuit Judge Kalodner, as a District Judge, denied recovery on a bargain which was merely in contravention of a policy of plaintiff's employer. **Pollock v. MacElree**, 56 F. Supp. 961 (E. D. Pa. 1944). And in **Reiner v. North American Newspaper Alliance**, 239 N. Y. 250, 181 N. E. 561 (1932), rules of morality were applied to sustain a defense to a contract action even where no fiduciary obligation was breached.

The basic principle underlying the denial of recovery to petitioner has long been part of the law of Pennsylvania, as well as other jurisdictions, and has been recognized by this Court.[1]

Nor did the Courts below have any difficulty with petitioner's argument that respondents had waived the defense of illegality by failing to plead it. Actually, respondents did specifically raise this defense at the end of petitioner's direct testimony, and before starting their own, and the Trial Court exercised its clear discretion under

---

[1] See **Wolfe et al. v. International Re-Insurance Corporation**, 73 F. (2d) 267 (C. C. A. 2d, 1934); **Myers v. Hodges**, 2 Watts (Pa.) 381 (1834); **Everhart v. Searle**, 71 Pa. 256 (1872); **Johnson**, to use of **McCarter v. Nippert (No. 1)**, 294 Pa. 464 (1928); **The Pennsylvania Railroad Co. v. Flanigan**, 112 Pa. 558 (1886); **New Haven Road Const. Co. v. Long, et al.**, 269 Mass. 16, 168 N. E. 161 (1929); **Rhoades v. Malta Vita Pure Food Co.**, 149 Mich. 235, 112 N. W. 940 (1907); **Atlee et al. v. Fink**, 75 Mo. 100 (1881); *cf.* **Oscanyan v. Arms Company**, 103 U. S. 261 (1880); **The Michigan Steel Box Co. v. The United States**, 49 Ct. Cl. 421 (1914).

Rule 15 (b) of the Rules of Civil Procedure in allowing the amendment.

But Judge Kirkpatrick regarded this amendment as unnecessary, and as having been offered by respondents "out of what appeared to the Court an abundance of caution" (R. 387a, 78 F. Supp. at 848). For it is perfectly plain that if illegality of a contract appears at any stage of the trial, and certainly where it appears from plaintiff's own proof, defendant may take advantage of it by motion, or, if need be, the Court will itself raise the objection. **1 Moore's Federal Practice**, p. 568; **Fitzsimons v. Eagle Brewing Co.**, 107 F. (2d) 712, 713 (C. C. A. 3rd, 1939).

This Court has sustained a directed verdict on the ground of illegality which was revealed **in the opening statement of plaintiff's counsel**, although not specially pleaded. The Court held that where a contract "was a corrupt one, forbidden by morality and public policy • • • the objection to a recovery **could not be obviated or waived by any system of pleading**, or even by the express stipulation of the parties. It was one which the court itself was bound to raise in the interest of the due administration of justice." And the rule was held applicable "in all cases where the services for which compensation is claimed are forbidden by law, **or condemned by public decency or morality.**" **Oscanyan v. Arms Company**, 103 U. S. 261, 267, 268 (1880).

Obviously, the new Rules of Civil Procedure, to which petitioner looks for relief despite this Court's statement in the **Oscanyan** Case, *supra*, were intended to liberalize stringent codes of pleading, and certainly did not institute "a rigorous kind of pleading not heretofore required." See **Tillman v. National City Bank of New York**, 118 F. (2d) 631, 635 (C. C. A. 2nd, 1941).[2]

---

[2] In probing for a basis to assert a conflict between circuits, petitioner cites decisions of the Court of Appeals for the Second and Fifth Circuits purportedly holding that

Petitioner has overlooked a fundamental principle of pleading law.

The function of pleading is to define and limit the issues upon which evidence will be offered at the trial. The purpose is to put the adverse party on notice of the nature of what the pleader intends to prove.

The effect of Rule 12 (h) is to preclude a defendant from **offering evidence** relating to a defense not pleaded, unless an amendment is made under Rule 15 (a).

In the present case, respondents offered no evidence on the question of illegality other than petitioner's own testimony. Petitioner himself proved that his contract was void. All respondents did was to call this to the Court's attention by a motion to dismiss on the ground that petitioner had failed to state a claim upon which relief could be granted. This defense is expressly available at the trial on the merits, whether or not pleaded [Rule 12 (h) (1)].

But even if respondents had neglected in any manner to mention the defense of illegality, it is clear, as this Court has said, that the matter could have been raised by the Trial Judge *sua sponte*.

Thus the only real issues in this case are, and have been by both Courts below, easily disposed of.

---

affirmative defenses required to be pleaded under Rule 8 (c) are waived if not pleaded "before trial" (petition, p. 14). But in both cases cited, the affirmative defense was **raised for the first time in any manner in the appellate court.** Of course, that was too late, especially where, as in the cases cited, the defense was **not** illegality. Those cases are clearly inapplicable. And the Second Circuit, in the **Tillman** Case, *supra*, has followed the rule of this Court in holding that failure to plead an affirmative defense is immaterial if **evidence** of the defense is introduced without objection. In the instant case, petitioner not only did not object to the evidence of illegality; the evidence was his own.

The remaining points argued by petitioner were either fully answered in the District Court's opinion or were so lacking in substance as to be completely disregarded.

However, perhaps again out of "an abundance of caution", respondents feel obliged briefly to discuss some of these points, primarily in order to correct the numerous discrepancies and misimpressions in petitioner's presentation of the factual situations involved.

2. Petitioner's Effort to Escape Effect of Illegality of Contract.

(Petitioner's Question 3.)

Petitioner has never undertaken to deny the existence of the principle of public policy applied by the Courts below. On the contrary, unable to cite a single decision of any court in opposition to the fundamental concept that an unfaithful servant will not be permitted to profit by his unfaithfulness, petitioner, as he did in both the District Court and the Court of Appeals, has here frantically attempted to take himself out of the rule. His efforts below were summarily disposed of by Judge Kirkpatrick in one paragraph of his opinion (R. 386a-387a, 78 F. Supp. at 848). They impressed Chief Judge Biggs and Circuit Judges Goodrich and Kalodner so little that they affirmed the District Court *per curiam* on Judge Kirkpatrick's opinion. Yet the same excuses are here advanced to excuse petitioner's perfidy.

Petitioner asserts (petition, p. 8) that his employer, American Oil Company, was not interested in keeping Parkway Oil Company as a customer; that on one occasion in 1941 American threatened to cancel its contract with Parkway, and petitioner "saved the day" (R. 76a); and that since July 1, 1943, according to the Record, there was no written contract between American and Parkway (R. 294a).

As a matter of fact, petitioner's assertions were completely unworthy of belief, since, from 1939 on, every contract between American and Parkway contained a mutual cancellation clause of which American never took advantage (R. 75a). And even if there had been no contract after July 1, 1943, the fact is that Parkway continued to be American's largest customer in the Philadelphia area until settlement on the sale of stock to the Texas Company on August 1, 1945, under an agreement dated June 27, 1945 (R. 60a, 137a). Furthermore, although petitioner said his employer did not seem concerned "when the **contract** was canceled in 1945 by the sale to the Texas Company" (R. 75a), it was a curious coincidence that shortly after that cancellation, petitioner's employment by American was abruptly terminated (R. 58a). Finally, in his deposition, petitioner apparently felt that his employer regarded Parkway as an account worthy of retention when he testified that during the negotiation with the Texas Company he "doubted seriously whether American would release the contract [with Parkway] to a competitor" prior to its expiration (R. 332a-333a).

But aside from the complete incredibility of petitioner's testimony, it was certainly not for him, as sales manager of American, to decide whether American would or would not like to lose its largest customer in the Philadelphia area. The prophylactic rule applied by the Courts below would be totally ineffective if an agent could betray his principal and then claim that the principal had not been harmed. The law denies him that prerogative. In fact, even if proved, the absence of actual harm to the betrayed principal is immaterial, as Judge Kirkpatrick pointed out in his opinion (R. 387a, 78 F. Supp. at 848).

Petitioner also sought some solace from the fact that he had no actual contract of employment with American and the relationship was terminable at will (R. 60a, petition, p. 8). Obviously, nothing in the rule of public policy applied by the Courts below is dependent on a contractual

relationship between the principal and the unfaithful agent. The fact is that petitioner was sales manager of American throughout the period of negotiations with the Texas Company, from 1940 to August, 1945, and throughout this period continuously accepted a salary in excess of $14,000 per year (R. 57a-59a).

Petitioner's effort to bring his conduct within the permissive scope of Section 393 (e), **Restatement of Agency**, was so thoroughly disposed of by Judge Kirkpatrick (R. 385a-386a, 78 F. Supp. at 847) as to require no further comment by us.

But, finally, petitioner himself showed that he did not really believe his own story that his efforts to turn one of American's best customers over to Texas was not hurting American. If this were so, he should have had no hesitancy in telling his employer all about his alleged contract with Mr. Goodman and the ensuing negotiations. He was asked whether he had ever told his superior or anyone else in American, during the period from March 1940 on, that he was advising and consulting with and trying to help Goodman sell his business to Texas. His reply does not indicate in the transcript the complete incredulity and contempt with which he viewed that suggestion, when he answered, with a slight laugh, "Why, of course not" (R. 76a). It was inconceivable to him that anyone would suppose that he would tell his employer of his unfaithfulness.

Similarly, it is significant that on his first visit to the Texas Company, petitioner requested that any letters be addressed to his home and not to his office at American (R. 94a).

Under these circumstances, Judge Kirkpatrick dismissed petitioner's feeble attempt to escape the effect of his immorality as follows (R. 386a-387a, 78 F. Supp. at 848):

> "There was some rather equivocal testimony on the part of the plaintiff to the effect that American

was not greatly interested in retaining Parkway as a customer. In view of the facts that no witness was called to substantiate this testimony, that American renewed its contract with Parkway, after the plaintiff made his contract with Goodman, for a further period of three years during which period American could have cancelled on six months' notice but did not, and the further fact that the plaintiff did not advise American of what he was doing (and in fact made some effort to conceal it by directing Texas to write him at his home address), no finding could have been made that his violation of duty was 'effectively consented to by the beneficiary or principal of the fiduciary.' Restatement, Contracts, Sec. 570. Beyond all this, however, it is to be remembered that the rule is a prophylactic one. 'Actual injury is not the principle the law proceeds on, in holding such transactions void.' Lum v. McEwen, 56 Minn. 278, 57 N. W. 662. '"* * * the rule is not intended to be remedial of actual wrong, but preventive of the possibility of it."' Everhart v. Searle, 71 Pa. 256."

From this statement, petitioner has extracted one clause, referring to his failure to substantiate his testimony, and has construed this as imposing upon him the burden of disproving illegality (petition, p. 16). Obviously, the Trial Court meant no such thing. Acting within its proper sphere under Rule 50 (b) of the Rules of Civil Procedure, the Court merely pointed out that under all the circumstances, including the equivocal testimony of petitioner, it could not be found that petitioner's employer had consented to his violation of duty so as to avoid application of the rule of public policy denying recovery in this case. "* * * nor could a jury find, that a promise by a third party to compensate a sales manager of a corporation for his services in taking a large customer away from his employer is not one that tends to induce a violation of his duty." (R. 385a, 78 F. Supp. at 847).

No more serious is petitioner's effort to introduce a constitutional question into this case. While not setting it forth in his statement of questions, petitioner in his argument suggests that he was denied trial by jury because the jury was not permitted to decide whether, **on his own testimony**, he had violated a fiduciary's duty to his employer (petition, pp. 15-16). If this were to be construed as a denial of trial by jury, virtually every nonsuit, directed verdict, and judgment rendered notwithstanding a verdict, whether in a State or a Federal Court, could be brought before this Court for review. Here there was no factual issue. It was plainly for the Court to decide whether, under uncontroverted facts elicited from the petitioner himself, the contract he sued upon was illegal. **Oscanyan v. Arms Company**, 103 U. S. 261, 266 (1880).

In the same category is petitioner's argument that his freedom of contract has been impaired (petition, pp. 16-17). In support of this point, petitioner cites **Steele v. Drummond**, 275 U. S. 199 (1927), where it was held that the contract in question was **not** contrary to public policy. The chain of reasoning from that case to the clearly immoral conduct of petitioner in the present case is difficult for us to follow.

We mention in passing,—for we feel certain that any constitutional argument has been injected in this case solely as a makeweight,—that no such point has ever been raised by petitioner in either Court below, and so in any event could not be raised for the first time in this Court. **Bailey v. Anderson**, 326 U. S. 203, 207 (1945); **Dorrance et al. v. Pennsylvania**, 287 U. S. 660 (1932); **Western Union Telegraph Co. v. Winland**, 182 Fed. 493 (C. C. A. 8th, 1910); see also **Chicago, Indianapolis and Louisville Railway Company v. McGuire**, 196 U. S. 128, 132 (1905).

Two Courts have now been sufficiently shocked by petitioner's conduct to deny him an opportunity to gain an advantage by reason of his illegal contract. Certainly, if

there is to be any honor in business, if employers are to feel safe in reposing confidence in their employes,—and especially their executives,—if public policy has any meaning in the law, this petitioner cannot be permitted to recover $50,000 on a contract which constituted the clearest kind of breach of the duty he owed the American Oil Company.

3. Petitioner's Motion for Judgment for $83,265.74.

(Petitioner's Question 5.)

Petitioner does not appear seriously at this time to press his motion to increase the judgment originally entered in his favor from $51,990.93 to $83,265.74 (petition, p. 19). However, in his statement of facts, petitioner states that as part of the transaction in which the stock of Parkway Oil Company was sold, a bulk oil plant was conveyed to two of the respondents, trading as P & G Realty Co., "for an inflated, stated consideration," and was leased by them to the Texas Company for twelve years at an annual rental of $30,000, subject to an option to purchase at the end of the term for $197,500 (petition, p. 5). Later (petition, p. 10), petitioner asserts that the value of the bulk plant "was shown by the testimony to be $557,500" (although in his motion he placed the value at $549,940,—R. 379a).

Petitioner's reference for the last statement was to page 140a of the Record, where one of the respondents testified as to the amount of rent and option price on the bulk plant. Apparently petitioner's "proof" of the value of the bulk plant consists solely of his own computation of the total rent for 12 years plus the option price. Small wonder that Judge Kirkpatrick stated, near the end of the trial (R. 287a):

> "Well as the record stands now, there is no evidence in the record, as I see it, that the rental value was

inflated or that the option price was an inflated price. The record now stands devoid of such evidence."

Actually, the uncontradicted evidence establishes that Mrs. Pleet and Mrs. Goodman owned a number of service stations and leases. The Texas Company apparently wanted the service stations and not the bulk plant. Accordingly, an exchange was worked out whereby Parkway Oil Company conveyed the bulk plant to Mrs. Pleet and Mrs. Goodman and they conveyed the stations and leases to Parkway (R. 143a). The value of the consideration on both sides of the exchange was fixed at $185,000 (R. 188a).

The only testimony relied upon by petitioner at the trial to controvert this testimony was the consideration set forth in the deeds of some of the service stations (R. 214a-215a). Obviously, as Judge Kirkpatrick stated at the trial (R. 287a):

> "• • • You cannot establish the value of the property by merely showing what somebody paid for it.
>
> "I am ready to so rule."

Petitioner under no theory could be allowed to recover a commission both on what was sold and what was not sold. The Trial Judge was clearly correct in not even submitting this question to the jury, and in denying petitioner's motion for judgment in the higher amount (R. 391a).

4. Alternative Award of New Trial.

(Petitioner's Question 4.)

As to this point, petitioner satisfied himself solely with citing **Laxier Gas Engine Co. v. DuBois**, 130 Fed. 834 (C. C. A. 3rd, 1904), as seemingly in conflict with the award to respondents of a new trial in the alternative.

The District Court awarded a new trial in the alternative because of the jury's complete disregard of his instructions. The reasons stated by Judge Kirkpatrick

need no amplification (R. 388a-390a, 78 F. Supp. at 848-849). The **Laxier Gas Engine** Case, *supra*, is not in point. There the Trial Judge, in the exercise of the broad discretion reposed in him in such matters, refused to grant a new trial, on the unusual facts there present, since the jury had achieved "substantial justice."

While it may be argued that a Trial Judge is not **required** to grant a new trial on account of the jury's disregard of his instructions, it certainly cannot be said to be an abuse of his discretion to do so. See, e. g., **Frye v. Lyon**, 299 Fed. 926 (App. D. C. 1924); **Mullett v. Milkey**, 113 Vt. 42, 29 A. (2d) 806 (1943); **R. F. Baker & Co., Inc. v. P. Ballantine & Sons**, 127 Conn. 680, 20 A. (2d) 82 (1941).

Certainly where, as here, the jury clearly revealed its failure to comprehend the issues in the case (R. 366a-374a), the Court had no choice but to grant respondents' alternative motion for a new trial.

5. Uncertainty of Petitioner's Contract.

Respondents argued in the Court below that the oral contract upon which petitioner sought recovery was too vague and indefinite to support a cause of action.

In view of the rulings of the District Judge and the Court of Appeals on the other questions involved, this question was not expressly ruled upon.

Respondents mention it here only to apprise this Court of respondents' contention that, particularly under the law of Pennsylvania, petitioner could not prevail even if his contract were not illegal. See **Restatement of Agency**, Section 449, Comments *b* and *c*; **Albright v. Kalbitzer**, 62 F. Supp. 815 (E. D. Pa. 1945); **Turner v. Baker**, 225 Pa. 359, 74 Atl. 172 (1909); **Wilson et al. v. Franklin**, 282 Pa. 189, 127 Atl. 609 (1925); **Dain v. Loeffler et al.**, 256 Pa. 319, 100 Atl. 888 (1917); **Kozhowski et al. v. Litvinas**, 87 Pa. Su-

perior Ct. 406 (1926); **Van Pelt et al. v. Casaccio et al.**, 86 Pa. Superior Ct. 590 (1926).

Similarly, Parkway Oil Company, argued below that the only testimony establishing a contract was to the effect that petitioner would receive a commission on the sale of Parkway's **assets** by the corporation, and therefore, on no theory could a verdict for a commission on the sale of **stock** by the stockholders be supported. The Courts below had no occasion to pass on this contention.

CONCLUSION.

The decision of the Court below is clearly correct. No important question of law or conflict of decisions is presented. No other basis for certiorari even appears in petitioner's Questions Presented. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

BERNARD G. SEGAL,
IRVING R. SEGAL,
Attorneys for Respondents.

SCHNADER, HARRISON, SEGAL & LEWIS,
1719 Packard Building,
Philadelphia, Pennsylvania,
Of Counsel.